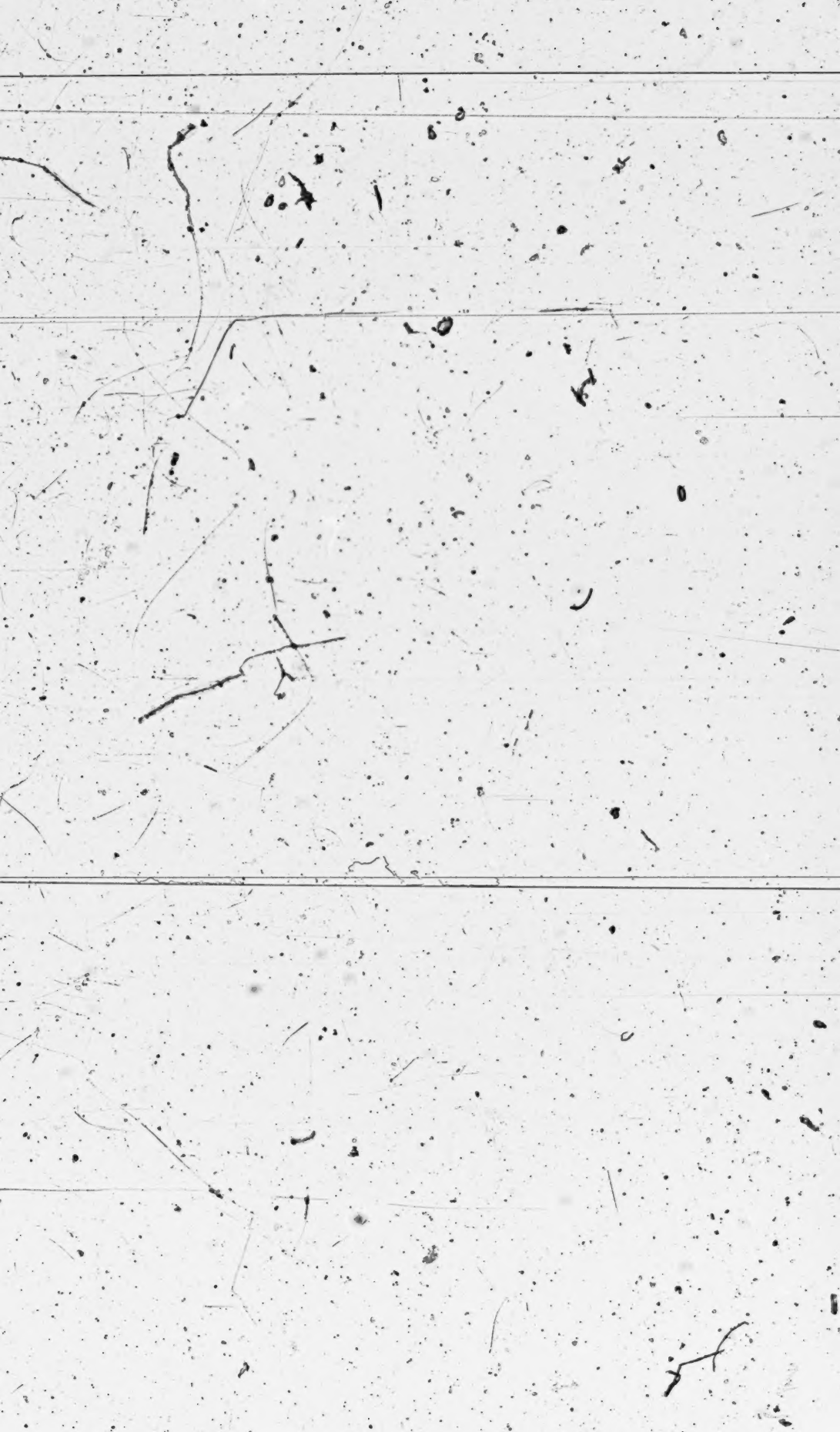

IN THE

Supreme Court of the United States

October Term, 1947
No. 533

TORAO TAKAHASHI,

Petitioner,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTIAN and WILLIAM SILVA as members thereof.

Brief of the Japanese American Citizens League, Amicus Curiae.

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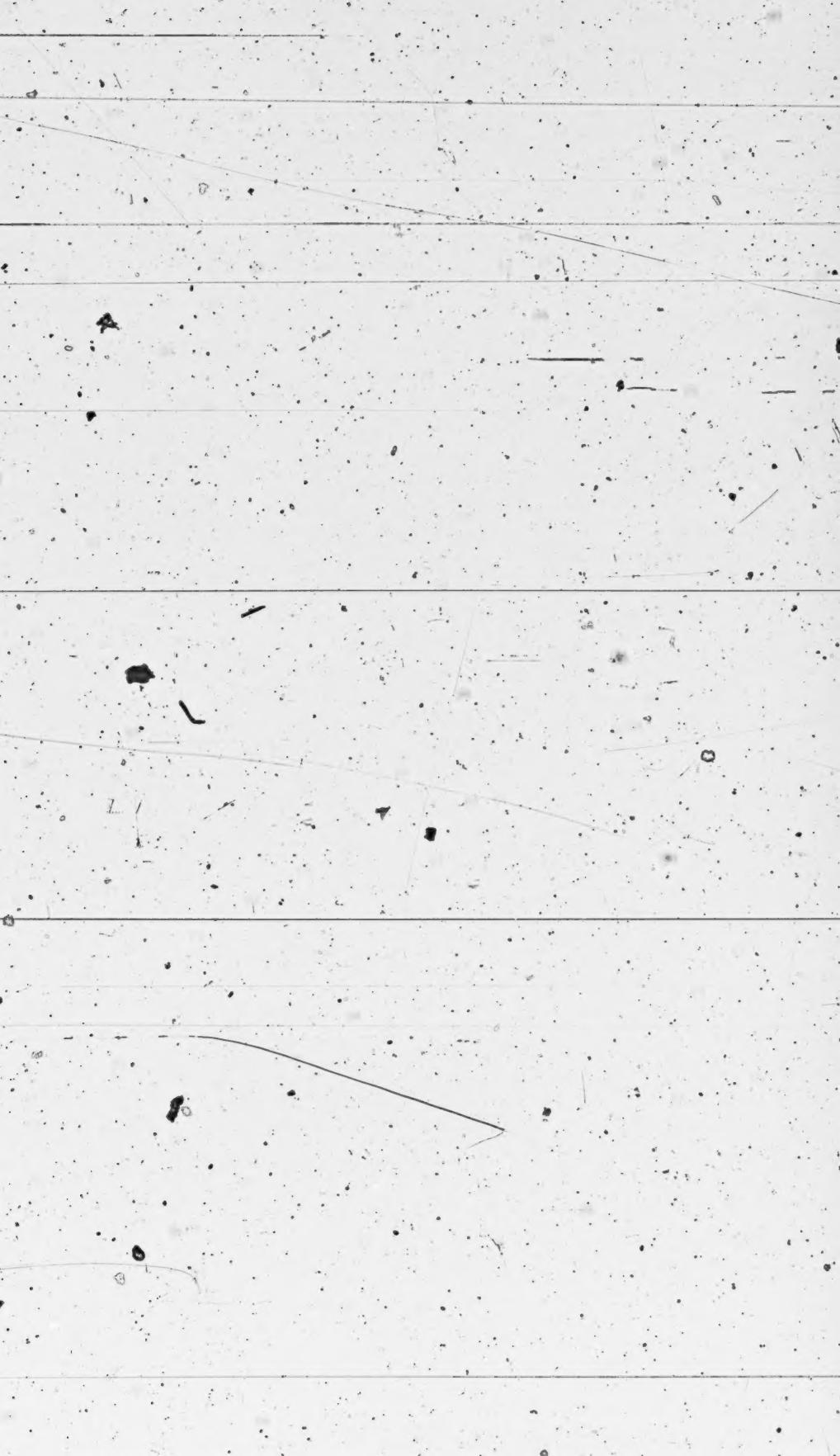

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The Interest of the Japanese American Citizens League.

The Japanese American Citizens League[1] is familiar with the problems of persons of Japanese ancestry in the

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[1] Japanese American Citizens League (JACL)—A Statement of Policy, January 1947.

"The Japanese American Citizens League is in existence because there are problems and adjustments which are peculiar to Americans of Japanese Ancestry. The term 'Japanese American' in the name of the organization is used merely to identify the problems, not identify the constituency, or to describe the organization. Moreover, the designation 'Japanese American' does not limit the membership of the organization exclusively to Japanese Americans. On the contrary, we encourage and solicit other Americans to join with us for we need them to build the strongest possible organization. We believe that as we work for the solution of the problems peculiar to our own minority group, we are helping constructively thereby to solve the total problems of all minorities.

"We are often asked: 'Why does not JACL take a stand upon important issues other than just those which affect Japanese

State of California. Through its educational program, false and misleading propaganda designed to prejudice the public mind is combatted.[18] Up to the outbreak of hostilities with Japan, considerable progress had been made in bringing about a better understanding and appreciation of the Japanese population within the state. Then war hysteria ran rampant and destroyed whatever advance that had been achieved.

What the racists and "white supremacy" forces had not been able to effectuate after years of insidious repetition of lies, distortions and half-truths, the shock of the Pearl Harbor attack and the hatred engendered against descendants of the enemy country enabled the attainment

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Americans and other groups as racial minorities?' Our basic premise is that when we start taking stands as an organization upon other matters, we begin to set ourselves apart as a group. Upon such issues we believe that our individual members should express themselves as individual Americans and join actively with whatever groups and organizations in their communities best express their own thinking and points of view. Moreover, the membership of JACL is made up of various individuals with different viewpoints. To take stands upon issues where opinions are divided would be to create disunity among our group. We hold, however, that all of our membership can go along and work together upon the basic problems which affect people of Japanese ancestry.

"When the time comes when we Americans of Japanese ancestry face only those problems which are no different from those faced by all other Americans, then JACL will have served its purpose and can be liquidated. In the meantime, we pledge and devote ourselves and our efforts to the hastening of that day."

People in Motion, published by the U. S. Department of Interior, p. 209, Government Printing Office, Washington, D. C. (1947).

[18]The Pacific Citizen is published at 415 Beason Building, Salt Lake City 1, Utah. The United States Department of the Interior in its report on the Postwar Adjustment of the Evacuated

of their goal: ridding California of all persons of Japanese ancestry.

Mass evacuation from their homes and confinement behind barbed wire fences in isolated, undeveloped areas and the consequent suspension of their civil rights, made the outlook for persons of Japanese ancestry in this country one of gloom and despair. Nevertheless, the Japanese American Citizens League staunchly and loyally adhered to its faith in American citizenship and democracy. It continued to bolster the morale of the disillusioned citizens of Japanese ancestry on the one hand and worked to present to the American public and government the desire of the Japanese Americans to serve in every possible manner their country in her hour of direst need.

Japanese Americans (People in Motion), United States Government Printing Office (1947), relies heavily on it for its sources of information. Also, the monthly "Summary on Race Relations," Fisk University, Nashville, Tennessee, uses material from this weekly publication extensively. JACL is the publisher.

Of the Pacific Citizen, Professor Eugene V. Rostov of the Yale University Law School said: "(It) is an indispensable source of material on events and attitudes with respects to the process of evacuation, internment and relocation." (54 Yale Law Journal 489.)

Richard J. Walsh, editor of Asia & Americas, said:

"I admire it for its Americanism, its clear loyalty to our country. I admire it for the wisdom and good temper with which it has dealt with the treatment given to our Japanese American citizens. . . ."

Allen Eaton of the Russell Sage Foundation of New York City said:

"Because of its service in a unique field affecting directly the lives of 70,000 Japanese American citizens, and indirectly, but vitally, all other citizens of this Republic, and because in the days to come our hope rests upon the kind of intelligence and devotion to American ideals which the Pacific Citizen represents, it deserves whatever support any of us can give." (Leaflet of JACL, published 1944.)

The respect and confidence reposed in the JACL by the Government leaders[2] as well as Americans in all walks of life[3] attest to the effective work that was carried out during the trying war years.[4] What the Japanese Americans contributed on the home front and the valors on the battle-

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[2]"The President has asked me to express his appreciation of the action of the Japanese American Citizens League in pledging support and assistance during the present emergency. Such assurances of cooperation are most gratifying to him."

By Wayne Coy, Special Assistant to the President, written to Mr. Mike Masaoka, National JACL Secretary, on February 6, 1942. (Brief of JACL, *Hirabayashi v. United States,* 320 U. S. 81.)

"Remarkably cooperative, for example, the Japanese American citizens have an organization called the Japanese American Citizens League, and it has carried on a most vigorous educational program among the total population, urging 100 per cent cooperation.

"In fact, I just cannot say things too favorable about the way they have cooperated under the most adverse circumstances."

By Dr. Milton S. Eisenhower, then the director of War Relocation Authority, testifying before Congressional Hearing on Appropriations, June 15, 1942, Washington, D. C. (Brief of JACL, *Hirabayashi v. United States, supra.*)

[3]"I have been deeply impressed with the sincerity and loyalty of the League members and of their sense of responsibility in these difficult times. I hope that every encouragement and help can be given to their important work."

Miss Pearl Buck, January 27, 1944. (Leaflet of JACL, 1944.)

"During the past 25 years I have worked with groups whose rights were attacked, and no group has showed more cooperation or more complete understanding of democratic principles than the JACL. Many Americans can learn from the JACL the meaning of true Americanism."

Roger N. Baldwin, Director American Civil Liberties Union, *supra* (Leaflet of JACL, 1948).

[4]"From time to time, JACL National officers sought and secured audience with high officials of the Department of War, Department of Justice, and of the War Relocation Authority, thus being given an opportunity to present Japanese American needs to Federal Officials at policy level, and to serve as an authoritative vehicle of information to the evacuated people. The JACL leadership was also concerned with public relations at the community level, and was successful in securing as sponsors a considerable number of persons prominent in national affairs." *People in Motion,* Department of Interior, p. 208 (1947).

fields of Europe and Pacific of the Nisei GI's have been the unrefutable answer to the doubts and suspicions of the pre-war days cast upon their loyalty.[5]

When the now famous 442nd Regimental Combat team, composed of volunteers, was organized, the JACL gave its full support; its executive secretary was among the first to offer his services.[6] Thousands, despite the illegal detention behind barbed wire fences,[6a] and the suspension of their rights as citizens, responded to the call.[7] The record established will long be remembered in the annals of the American military history of World War II.[8]

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[5]*They Work for Victory*, published by the Japanese American Citizens League under grant from Carnegie Endowment for International Peace, Washington, D. C. (1945).

[6]"When the Army opened its ranks to volunteers, the JACL actively supported the forming of the 442nd Regimental Combat Team . . ." *People in Motion*, Department of Interior, p. 208 (1947).

[6a]*Ex parte Endo*, 323 U. S. 302.

[7]"Official Army records released to the JACL in May of 1947, and carried in the Pacific Citizen of May 17, show that a total of 33,320 persons of Japanese ancestry had served in the wartime and postwar Army of the United States, up to that time. Of these 40 were Japanese aliens." *People in Motion*, Department of Interior, p. 216 (1947).

[8]Partial award list of 442nd Regimental Combat Team: Individual Awards—Congressional Medal of Honor, 1; Distinguished Service Cross, 47; Distinguished Service Medal, 1; Oak Leaf Cluster to Silver Star, 12; Silver Star, 342; Legion of Merit, 17; Soldier's Medal, 15; Oak Leaf Cluster to Bronze Star Medal, 38; Bronze Star Medal, 810; Air Medal, 1; Purple Heart Medal, 3600;* Oak Leaf Clusters to the Purple Heart Medal, 500;* Army Commendation, 36; Division Commendation, 87; Croix De Guerre (French), 12; Palm to Croix De Guerre (French), 2; Croce Al Merito Di Guerra (Italian), 2; Medaglia De Bronzo Al Valor Militare (Italian), 2 Unit Awards—Distinguished Unit Citation, 7; Meritorious Service Unit Plaque, 2; Army Commendation, 1.

"Americans"—The Story of the 442nd Combat Team—By Orville C. Shirey, Infantry Journal Press, Washington, D. C., p. 101.

*See footnote on page 101 of "Americans."

This brief *amicus* is presented in order to acquaint the Court with the facts that the JACL had acquired from the several campaigns to defeat the discriminatory fishing bills in the California State legislature.

The instant case falls into the pattern of litigation with which the JACL has always concerned itself.[9] Not only is the right of a Japanese national to engage in a common occupation involved, but also the more fundamental one of earning a livelihood. And if today California can distinguish between persons, solely because of the accident of birth or racial background, as to who may and who may not engage in a particular field of employment, tomorrow other states, and perhaps even the Federal Government, may use race, color, creed, or national origin as the measure of the right to live.

History of Fishing by Japanese in California:

The alien Japanese who are being denied the right to obtain licenses for commercial fishing by the State of California through Section 990 of the Fish and Game Code[10] have made important contributions to the development of

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[9]JACL has filed briefs *amicus* in the following cases: *Hirabayashi v. United States*, 320 U. S. 81; *Korematsu v. United States*, 323 U. S. 239; *Regan v. King*, 134 F. (2d) 413, cert. den. 319 U. S. 753; *Oyama v. California*, 68 S. Ct. 269; *Mendez v. Westminster School District*, 161 F. (2d) 774; *Hurd v. Hodge*, No. 290, October Term, 1947; *Amer-Kim v. Superior Court of Los Angeles County*, No. 429, October Term, 1947.

[10]Stats. 1945, Chap. 181, Sec. 3.

the fishing industry of that state. They had been engaged in this occupation and earned their livelihood for many years prior to the outbreak of war with Japan.[11]

Northern California.

The history of the Japanese in northern California fishing dates back to 1892, when about six fishermen were employed by an American fish cannery in Monterey bay for squid fishing. This first contingent was followed in 1900 by eight others who attempted salmon fishing. By 1910 about 145 Japanese were employed by American canneries in this area. They fished for yellowtail, tuna, sea bass, smelt, rock cod, sardines and barracuda.

The first Japanese to engage in abalone fishing was Otosaburo Noda, who began fishing at Point Lobos near Monterey. It is interesting to note that in 1896 Noda and a partner of his invited an expert from Japan to develop

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[11]The factual material set forth in this section of the brief, unless otherwise noted, has been obtained from the article by Eiji Tanabe in the Pacific Citizen, March 27, 1948, and from the brief of Walter T. Tsukamoto filed in opposition to Assembly Bills 336, 1883, 2414, 2415, and Senate Bills 278 and 736 of the 1939 session of the California Legislature to amend Section 990.

(A copy of Mr. Tsukamoto's Brief is being filed with the Clerk of this Court.)

Eiji Tanabe is the Pacific Southwest regional office director of the Japanese American Citizens League, Los Angeles, California. He has translated materials from the "History of the Japanese in America," published by the Japanese Association of America, San Francisco, California, 1940. Tanabe served as a senior instructor of Japanese at the University of Michigan Army Military Intelligence School, Japanese Language Section, during the war years.

Walter T. Tsukamoto was the legal counsel for the JACL in 1939 and is now serving as Lieutenant-Colonel, JAGD, United States Army of Occupation, SCAP, Tokyo, Japan.

a new method of abalone fishing. The Department of Agriculture and Commerce of Japan sent Gennosuke Otani; who was then experimenting with a specially devised diving suit for abalone fishing off the coast of Japan. Otani arrived in the United States in October of 1896. Abalone fishing proved to be successful, and the enterprise expanded into the drying and exporting of abalone. Large quantities were shipped to Japan.

The San Francisco bay area was then virtually virgin fishing grounds. There was an abundance of sardines, but few persons dared to challenge the irregular and dangerous weather conditions. It was Katsuyoshi Hamachi who first dared the elements and used his net to catch sardines in 1930. Many other Japanese followed him, after he proved the venture a success. Other nationality groups flocked to the area to boost the annual catch of sardines, and the San Francisco bay became one of the largest and richest commercial fishing grounds in the northern part of the state.

The sardine catch gradually climbed until in 1938 it reached 348,852,460 pounds. 1941 was the last year Japanese fishermen were allowed to fish. After Pearl Harbor they were prohibited from this industry and they were subsequently evacuated from the coast.

Southern California.

The Japanese fishing industry in the southern part of the state began around White Point in 1887 in the preparation of dry abalone. They did not begin to expand their interests in this region until 1900.

The first Japanese to settle around San Pedro harbor arrived in about 1899, but the fishing did not begin until 1902. Abalone and lobster were the principal catches.

Terminal Island, which eventually became the largest and most important Japanese fishing center, was first settled in 1910 by Japanese fishermen who were employees of the San Pedro Fish Canning Company. It was many years before the United States Navy considered using this place. The small island which was covered with sand and rocks and rattle snakes gradually changed into a liveable village. The peak of the Japanese population on Terminal Island was 3,000.

San Diego was another place where a Japanese fishing village was established in 1899. The peak was reached around 1927 and 1928 and gradually declined.

Oxnard at one time had promise of becoming a fishing center. Plans were made to move the Terminal Island fishing industry to Oxnard since there had been discussion of the U. S. Navy using the entire island for its purposes.

Charges Against Japanese Fishermen.

The excuse of conservation as the reason for the discriminatory amendment to Section 990 of the Fish and Game Code is a recent innovation. Formerly, the legislators and proponents who desired to prevent the alien Japanese from continuing in the industry which they had helped to develop did not exercise any finesse in expressing their prejudiced reasons. They frankly claimed that it was a necessity for national defense and safety.

Considerable propaganda was carried on, accusing the Japanese fishing boats and their captains of engaging in activities outside their business as fishermen.[12]

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[12] "California and the Oriental," by State Board of Control of California, 1920, as amended to 1922, p. 107.

It was also insinuated that these Japanese fishing boats were potential mine-layers, and, fantastic as it may seem, one public official went so far as to say that they were equipped to discharge torpedoes.

Another charge was that the captains of the fishing boats were Japanese naval reservists.

All these false accusations and innuendoes were refuted by non-Japanese in the fishing industry.

The president of the Coast Fishing Company of Wilmington, California, stated:[13]

> "As for the resident Japanese supplying the home government with information regarding harbors, coast line, cities, etc., may I point out that at any local ship chandlery or other institution, including certain branches of our own government, there may be had by anyone, upon request or upon payment of a small fee, exact and up-to-date Bathymetrical and Topographical charts, maps and pictures giving marine and harbor soundings, land elevations and promontories, distances, locations, and what not; all compiled by agencies of our government, and with the greatest exactitude. So, we are expected to believe that members of the local Japanese fishing fleet are busily engaged in mapping and plotting our harbors, coast line, etc., and forwarding same to their home government, when common sense should tell us that every Japanese or other alien steamer entering any of our harbors probably has a personnel more capable of acquiring such information than are all members of the fishing fleet combined."

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[13]Mr. S. Hornstein, President of Coast Fishing Company of Wilmington, March 14, 1939, contained in Walter T. Tsukamoto's Brief.

Regarding the use of the Japanese fishing boats as mine-layers and so forth, former U. S. naval officers offered their testimony to refute such possibilities. Also, the president of the Westgate Sea Products Company of San Diego stated:[14]

> "If a torpedo was put on one of these Japanese fishing boats, they would not know what it was, let alone know how to fire it. Gunners from a warship, if they went on board one of these Japanese fishing boats and a torpedo was given them, would be just as helpless as the fishermen. The idea of them having compressed air, sufficient to launch a torpedo, is silly. There would not be power enough to discharge a shotgun."

On the subject of the captains of the fishing boats being Japanese naval reservists, the vice president of the Van Camp Sea Food Company, Terminal Island said:[15]

> "The Japanese Government has absolutely nothing to do with these boats, nor did it subsidize them in any way. The owners and captains of these boats have been residents of California for many years (20 to 30). I have known them for more than 20 years, or ever since I have been in the fishing business. If they are naval officers, Japan must have had a long vision and started them out 25 years or 30 years ago, before any of these accusations were dreamed of. I don't believe there is a man in Cali-

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[14]Mr. Wiley Ambrose, President of the Westgate Sea Products Company of San Diego, March 14, 1935, contained in Walter T. Tsukamoto's Brief.

[15]Mr. B. Houssels, Vice President of Van Camp Sea Food Company, Inc., of Terminal Island, February 27, 1935, contained in Walter T. Tsukamoto's Brief.

fornia in a better position to know the facts relative to the matter than myself, and I am sure there is absolutely no basis for the statements made."

Dr. Edward K. Strong, Jr., Professor of Psychology at Stanford University, and author of books based on studies of the Japanese in California[16] stated in 1935:

"According to the census there are about a thousand Japanese engaged in fishing, primarily out of Monterey and San Pedro. These men have been so engaged in for twenty to thirty years. They are advancing in age, of course, and it won't be so very long before most of them will drop out naturally. There is no indication that their sons are going to follow in their footsteps, so that if we leave the matter alone, as far as I can see the Japanese will be replaced slowly and gradually by other people. For all I can gather children born in this country do not go into fishing in any considerable number, so that if we eliminate the thousand Japanese their work would be taken over by Italians and other nationalities who are to large degree aliens themselves. . . .

"These Japanese fishermen have their homes in Monterey and San Pedro with their families. If they are prohibted to earn their living, we shall have that additional load upon our relief fund. At least their

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[16]Statement March 19, 1935, contained in Walter T. Tsukamoto's Brief.

Dr. Strong supervised the survey of Japanese under grant of the Carnegie Corporation and is author of: "Vocational Aptitudes of Second Generation Japanese in the United States" (1933); "Japanese in California" (1933); "The Second-Generation Japanese Problem" (1935).

children who are American citizens will have a right to relief, even if we were so hard-boiled as to refuse relief to their parents.

"The Japanese fishermen are among the most efficient of our fishermen on the Coast, and if they are eliminated, I imagine there will be serious loss to the canning industry for a season or two until new men can be secured and broken in to the business.

"To me the most serious objection is that it would furnish real evidence of the inability of Californians to play fair with a very small group of Japanese who have lived in the state many years, have been thoroughly efficient in their work, and have behaved themselves in a most remarkable way."[17]

While the Japanese were living in California, they and their friends were able to refute the lies and prevent passage of any discriminatory fishing legislation. The canneries which were the principal employers and buyers of the catches of the fishermen were the strongest champions of the Japanese right to engage in commercial fishing. It was only after the mass evacuation from the West Coast under army orders that the racists were able to push through an amendment to Section 990 of the Fish and Game Code in 1943 whereby only alien Japanese were prohibited from commercial fishing. Subsequently in 1945, a further amendment was made to give a semblance of respectability by inserting the words, "ineligible to citizenship" in the place of "alien Japanese."

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[17]The Brief of Walter T. Tsukamoto contains an exhaustive collection of letters and statements to the same effect.

The 1943 and 1945 Amendments to Section 990 of the Fish and Game Code in Relation to Anti-Japanese Agitation.

Whether the present provision of Section 990 was passed as a conservation measure or the result of war hysteria and a means to carry out the policy of excluding the alien Japanese from the state should be considered in connection with the public history of the times.[18]

By July 31, 1942, the Commanding General of the Western Defense Command and Fourth Army, acting under the authority delegated to the Secretary of War,[19] had caused all persons of Japanese descent residing in California and in the eastern part of Oregon and Washington, with a few exceptions, to be confined in Assembly Centers under military control.[20] Before the end of October, 1942, most of these "Japanese", both citizens of the United States and aliens, had been transferred to camps operated by the War Relocation Authority, a civilian agency of the Department of Interior.[21]

This drastic and unprecedented action of the federal government toward a group of people who had in common only their national ancestry and physical character-

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[18] *In re Ah Chong*, 2 Fed. 733, 737.

[19] Executive Order 9066 (February 19, 1942), and Public Law 503 (77th Congress, March 21, 1942).

[20] U. S. Army, Western Defense Command and Fourth Army, *Final Report Japanese Evacuation from the West Coast, 1942.* Report of Lieutenant General John DeWitt to the Secretary of War (Washington: U. S. Government Printing Office, 1943), pp. 107 and 109.

[21] U. S. Department of the Interior, War Relocation Authority, *The Evacuated People: A Quantitative Description* (Washington: U. S. Government Printing Office, 1947), Table 6, p. 18.

istics which defined them in the popular mind as a "race", conformed almost exactly to the demands of some West Coast pressure groups.

At least two of these organizations whose programs were implemented by the action of the military authorities, the Native Sons of the Golden West and the California Joint Immigration Committee, had records of anti-Oriental agitation extending back to the early 1900's. However, the success of their campaign to "get rid of the Japs" did not put an end to the agitation of the anti-Japanese forces. Early in 1943 they renewed their campaign, this time seeking to prevent the return of the "Japanese", whether United States citizens or aliens, to California after the war.

A summary of this agitation is contained in *"Prejudice: Japanese-Americans Symbol of Racial Intolerance."*[22] It is noted that early in January, 1943, State Senator Clarence C. Ward of Santa Barbara County, undertook a statewide tour to organize opposition to the return of the "Japanese." The speech of Mr. C. L. Preisker, Chairman of the Board of Supervisors of Santa Barbara County, at one of Ward's meetings, merits quotation as revealing the motives behind the campaign, as well as its objectives:

> "We should strike now, while the sentiment over the country is right. The feeling of the East will grow more bitter before the war is over and if we begin now to try to shut out the Japanese after the war, we have a chance of accomplishing something. Now that

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[22] *Prejudice*. Carey McWilliams; Little, Brown & Co., 1944; Boston, Mass. See especially Chapter VII, "The Manufacture of Prejudice," pp. 231-273.

all the treaties between the two nations have been abrogated by Japan's war on the United States, Congress is under no treaty obligation and it could easily pass an act ordering all nationals of Japan to return after the peace and forbidding the immigration of others after the war. This would at least relieve us of part of the problem. Maybe the return of the aliens would mean that some of the American-born relatives would follow them. I think the state legislature should memorialize Congress for action. We don't want to see the time return when we have to compete with the Japanese again in this valley."[23]

Other individuals and organizations echoed Mr. Preisker's arguments in more inflammatory language. Notable were the exhortations of the Home Front Commandos, Inc., which had its headquarters in Sacramento:

"Come and hear the facts—Lend your help to Deport the Japs—If you can't trust a Jap, you won't want him as a neighbor—Any good man can become an American citizen, but a Jap is and always will be a Stabber-in-the-back gangster: Rebel. After the war, ship them back to their Rising Sun Empire."[24]

Dr. John R. Lechner, head of the Americanism Educational League of Los Angeles, purported to show the advantages of deporting the American Japanese after the defeat of Japan. In one of his pamphlets outlining the "Japanese menace" he wrote:

"No books on the contrast between our respective national policies, however ably written, could do as much in discrediting the Japanese propagandists and

[23]McWilliams, *Prejudice*, p. 233.

[24]McWilliams, *Prejudice*, p. 237.

cause as much shame to the Japanese people, as 122,000 Japanese, returning from continental America, spreading through every city and hamlet in Japan, actual personal testimony of the Christian treatment they had received here."[25]

To these organizations can be added the Pacific Coast Japanese Problem League,[26] Home Front Commandos, The No Japs, Inc., Council on Japanese Relation, and California Preservation League.[27]

The California Joint Immigration Committee was identified as the "real force" behind the 1943 agitation, working with and through the Native Sons of the Golden West, the California Department of the American Legion, the State Grange, and the Associated Farmers.[28] An excellent example of the work of the Joint Immigration Committee was the report it prepared for the House Un-American Activities Committee's investigation of Japanese propaganda activities in 1941 which was later incorporated in the hearings of the House Select Committee Investigating Defense Migration in 1942.[29] In 1943 the same

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[25]John R. Lechner, *Playing with Dynamite* (Los Angeles: Americanism Commission, 23rd District American Legion, Department of California, 1943), p. 15.

[26]Pacific Coast Japanese Problem League, *Pacific Citizen*, July 24, 1943; Home Front Commandos, *Pacific Citizen*, August 14, 1943; No Japs Inc., *Pacific Citizen*, December 4, 1943; Council on Japanese Relation, *Pacific Citizen*, January 27, 1945.

[27]*Pacific Citizen*, April 28, 1945.

[28]McWilliams, *Prejudice*, pp. 242-243.

[29]Report of the California Joint Immigration Committee as reproduced in U. S. Congress, House of Representatives, Select Committee Investigating National Defense Migration, *Hearings on Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones*, 77th Cong., 2d Sess., Part 29, San Francisco Hearings, pp. 11084-11087.

material was circulated in pamphlet form under the *imprimatur* of the Native Sons of the Golden West.[30]

Throughout 1943, the California Joint Immigration Committee's point of view was reflected in resolutions of American Legion posts, Chambers of Commerce, and other groups who joined in the movement to "keep the Japs out of California." The State Commander of the California Department of the American Legion, Mr. Leon Happell, stated in a speech at Marysville, California:

> "My suggestion is that we put the whole lot of them on the Japanese mandated islands when they have been taken away from Japan at the close of the war. There, under U. S. or United Nations control, they would escape the racial problem that is tough on us and the Japanese.
>
> "If the American Legion has anything to do with it, we will put them away for keeps.
>
> "The Japanese problem is a racial one and will be until we solve it. The whole program is loaded with dynamite."[31]

On the political level, anti-Japanese agitation was fostered, intentionally or unintentionally, by the two Congressional and three state legislative investigation of the relocation program conducted in 1943: (1) a sub-committee of the Senate Committee on Military Affairs; (2) the House Un-American Activities (Dies) Committee; The California legislature's Committee on Un-American

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[30]Native Sons of the Golden West, Committee on Japanese Legislation, *Why the West Coast Opposes the Japanese* (San Francisco: The Committee, 1943), pp. 1-8.

[31]*Pacific Citizen*, February 4, 1943.

Activities; (4) a Fact-Finding Committee on Japanese Resettlement of the California State Senate; and a similar committee of the California State Assembly. Though in all the cases the reports and recommendations of the Committees were less radical than the agitation in the public press, it was the activities of these committees that furnished the newspapers some of their most sensational stories.

It was during the height of the publicity attending the Senate and House Dies Committee investigations that Section 990 of the California Fish and Game Code was amended to read: "A commercial fishing license may be issued to any person other than an alien Japanese."[32] This amendment was introduced on January 18, 1943, approximately at the same time that State Senator Ward set out on his tour to organize Californians against the return of the "Japanese."[33] It was passed by the Assembly on April 9, one month after Senator Chandler of the Senate Committee on Military Affairs, had issued his sensationally publicized statement:

> ". . . in my mind there is no question that thousands of these fellows were armed and prepared to help Japanese troops invade the West Coast right after Pearl Harbor."

The proposed amendment was passed by the Senate on April 23, the day following the announcement of the execution of the American aviators who had been captured following the first raid on Tokyo. At that time the West Coast newspapers were attacking all things Japanese

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[32]California Statutes, 1943, Chapter 1100.

[33]McWilliams, *Prejudice*.

with exceptional vehemence, and few if any took pains to distinguish between the Nipponese war leaders who had ordered the atrocity and the Americans of Japanese descent who condemned the act as unequivocally and bitterly as any of their fellow citizens. Before the Governor had signed the bill on June 8, the advance publicity of the Dies Committee investigation of the relocation centers had been featured by the regional press. The distortions of fact incorporated in these stories helped to keep the public temper and those of the legislators aroused against the American Japanese.

The amendment of the Fish and Game Code of California was only one of the many anti-Japanese bills introduced in the 1943 session of the California legislature.[34]

Whether the California legislators by their actions reflected public opinion in favor of permanently excluding the "Japanese" or helped to mold public opinion to achieve the ends of economically interested pressure groups is

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[34]An article in the *Pacific Citizen* of April 1, 1943, summarized the situation as of that date:

"California's senate and assembly are still in session with several bills, resolutions and memorials which will affect the future of all the state's evacuated citizens of Japanese origin still in the hands of committees. The Engle, Lowery and Thurman memorials to Congress, seeking the disenfranchisement of United States citizens restrictions upon them, are being opposed by individuals and groups who see in the proposals a threat to the liberties of all Americans as well. Present indications are that these memorials may be allowed to die in committee. At Sacramento, however, the Engle bill to tighten the present provisions of the state's anti-alien land law . . . . will probably be sent to Governor Warren shortly for signature. It was approved unanimously by the senate last week.

"Another resolution by Assemblyman Lowery, calling for government requisition of the stored agricultural equipment of the farmer evacuees, was voted by the California assembly last Thursday."

immaterial. In either case, they introduced and passed laws directed against the minority of Japanese descent at a time when anti-Japanese agitation was at one of its high points in the state and in the nation. They were apparently the victims of this agitation, or its originators, or both; the result, in any event, was discriminatory legislation against persons of Japanese extraction.

The link between the 1943 amendment and the bill of 1945 which substituted the word "persons ineligible to citizenship" for the phrase "any person other than an alien Japanese," is provided by the report of the California State Senate Fact-Finding Committee on Japanese Resettlement. This committee announced that it had introduced Senate Bill 413 to make this change because it felt ". . . there is danger of the present statute being declared unconstitutional on the ground of discrimination, since it is directed against alien Japanese."[35]

Like its 1943 predecessor, the 1945 bill was passed at a time when anti-Japanese agitation in California had reached one of its periodic peaks. The occasion for the renewed outburst was the announcement by the military authorities on December 17, 1944, that the general exclusion orders against persons of Japanese descent living in the West Coast military areas were abolished, effective January 2, 1945. This announcement coupled with the decision of this Court in *Ex Parte Mitsuye Endo*,[36] handed down on December 18, 1944, touched off a series of anti-Japanese blasts from the state of Washington to the Mexican border.

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[35]California State Legislature, Senate, *Report of the Senate Fact-Finding Committee on Japanese Resettlement* (Sacramento: State Printing Office, 1945), p. 5.

[36]323 U. S. 283 (1944).

Again various interested groups began to hold meetings, pass resolutions, and issue press releases against the returning "Japanese."

State Senator Irwin Quinn of Humboldt County, a member of the Senate Fact-Finding Committee on Japanese Resettlement, stated on January 15:

> "We should investigate them (persons of Japanese ancestry). For years we have been trying to get these fishing licenses away from the Japanese. We think that it is an effrontery to the people of California that the WRA should come here and use every means to return fishing licenses to the Japanese."[37]

The following day approximately 300 residents of Placer County met and specifically agreed to boycott returning Japanese Americans and "persons who do business with Japanese." The meeting was called by Donner Post No. 1942 of the Veterans of Foreign Wars.[38] During the same week, the Monterey Bay Council on Japanese Relations was formed for "sincere, unselfish, and unprejudiced thinking" to "discourage the return of persons of Japanese ancestry to the area."[39]

The grand officers of the Native Sons of the Golden West adopted a four point program for state legislative action: (1) To prohibit persons of Japanese ancestry from fishing in California coastal waters; (2) To "put teeth" into the anti-alien land laws, which at present "allow" the ownership of land by American citizens of Japanese ancestry; (3) To empower the state attorney

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[37] *Pacific Citizen*, January 20, 1945.

[38] *Ibid.*

[39] *Pacific Citizen*, January 27, 1945.

general and various county district attorneys to enforce rigidly the escheat provisions of the anti-alien land act; (4) Strict prohibition of Japanese language schools.[40] The similarity of this program to the laws enacted by the 1945 session of the California legislature is remarkable. Equally noteworthy is the similarity of the groups which led the 1943 and the 1945 agitation.

When the first evacuees appeared to reclaim their farms and businesses, threats and rumors of violence were replaced by violence itself.[41] Between the recision of the general "Japanese" exclusion orders and May 14, 1945, there occurred 15 shooting attacks, 1 dynamiting attempt, 3 cases of arson and 5 threatening visits.[42] So serious was the situation that Secretary of the Interior issued a statement in which he said:

> "The shameful spectacle of these incidents of terrorism taking place at the back door of the San Francisco conference, now in session to develop means by which men of all races can live together in peace, must be ended once and for all. I believe that an aroused national opinion, rooted in the indignation of fairminded Americans throughout the country, will be a powerful aid to west coast state and local officials charged with bringing the vigilante criminals to justice."[43]

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[40] *Pacific Citizen*, February 17, 1945.

[41] *Pacific Citizen*, January 6, 13, 20, 1945; February 17, 24, 1945; March 10, 31, 1945.

[42] U. S. Department of the Interior, War Relocation Authority, *The Relocation Program* (Washington: U. S. Government Printing Office, 1946), p. 67; *Pacific Citizen*, May 19, 1945.

[43] U. S. Department of Interior War Relocation Authority, *The Relocation Program* (Washington: U. S. Government Printing Office, 1946), p. 67.

To draw the parallel between the history of Senate Bill 413 and the 1945 wave of anti-Japanese feeling in California, it is noteworthy that the bill was introduced on January 23, one week after some citizens of Placer County had signed a "boycott the Japanese" agreement, and less than a week after night riders had burned a shed on the property of Sumio Doi near Auburn in the same county and two nights later fired bullets into the same man's home.[44] The bill was passed by the Senate and sent to the Assembly on April 3, while attacks on returning American Japanese continued and the Assembly approved a $200,000 appropriation to speed prosecutions for violating the state's anti-alien land law. Senate Bill 413 was passed by the Assembly and sent to the Governor on April 27. During the same week the California Preservation League was formed in Sacramento to unify the anti-Japanese groups in the state and promote a campaign to refuse to sell or lease property to American citizens of Japanese ancestry.[45] The bill was signed by the Governor on June 8,[46] four days after State Senator Jack Tenney of Los Angeles had charged that federal civil service authorities had approved the employment of American Japanese "against whom counterespionage charges may be filed at any time." The Senator concluded his remarks by saying:

> "It is common knowledge that the FBI and officers of Naval and Army intelligence have not been consulted by the WRA in reference to the character or loyalty of the persons being released."[47]

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[44] *Pacific Citizen*, January 27, 1945.
[45] *Pacific Citizen*, April 28, 1945.
[46] Stats. 1945. Chap. 181, Sec. 3.
[47] *Pacific Citizen*, June 9, 1945.

The Senator omitted all reference to the loyalty investigations conducted in 1943 and 1944, and to the decision in *Ex Parte Endo.*[48]

During the 1945 session of the California Legislature which adopted the amendment to the Fish and Game Code, three other bills were passed directed against the alien Japanese group. Senate Bill 139, signed by the Governor on July 9, put escheat actions under the anti-alien land law in the hands of the State Attorney General and imposed the burden of proof on the defendant to show that conveyance was not made to avoid escheat.[49] Senate Bill 414, approved July 17, appropriated $200,000 for the Department of Justice to enforce anti-alien land laws and carry on escheat proceedings.[50] Senate Bill 415, approved July 9, provided that no statute of limitations was a bar to escheat actions in anti-alien land law cases.[51] A final victory for the anti-Japanese forces was the adoption of Senate Constitutional Amendment No. 17, filed with the Secretary of State of California on June 16, which submitted for popular ratification all amendments which had been placed in the California anti-alien land law since 1920.[52] By this device the way was opened to continue agitating the "Japanese menace" in the election of 1946.

From the evidence available, the conclusion that the 1943 and 1945 amendments to the Fish and Game Code of California were inextricably linked with anti-Japanese agitation of the period appears inescapable. To maintain that these amendments were isolated phenomena, traceable solely to a concern for the conservation of the state's resources, is, in the circumstances, untenable.

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[48]323 U. S. 283.
[49]Stats. 1945, Chap. 1129, Sec. 1 and Sec. 3.
[50]*Ibid.*, Sec. 4.
[51]Stats. 1945, Chap. 1136, Sec. 1.
[52]Proposition 15 on the November 1946 election ballot.

Ineligibility to Citizenship Is an Unreasonable Classification by Which to Deny Commercial Fishing Licenses.

The discretionary latitude permitted states to classify persons must not be an irrational discrimination even against aliens. The protection and guaranties of the Fourteenth Amendment are not limited to citizens but include aliens.[53]

The legislature must exercise a reasonable discretion. If its action is a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class, it will not pass the constitutional test.[54]

> "Distinctions between citizens solely because of their ancestry are by heir very nature odious to a free people whose institutions are founded upon the doctrine of equality. If no reason exists except hostility to the race and nationality, the discrimination is illegal. Consequently, such laws would be a denial of the equal protection of the law and a violation of the Fourteenth Amendment."[55]

The mere fact that the legislature has made a classification is not sufficient. There must be a reasonable ground —"some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection."[56]

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[53]*Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *In re Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Ho Ah Kow v. Nunan*, 5 Sawy. 552; *Wong Wai v. Williamson*, 103 Fed. 1; *Fraser v. McConway & Farley Co.*, 82 Fed. 257; *Lem Moah Sing v. United States*, 158 U. S. 538.

[54]*Holden v. Hardy*, 169 U. S. 366, 398.

[55]*Yick Wo v. Hopkins*, 118 U. S. 256, 374.

[56]*Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 165.

Any legal restriction which entails the civil rights of a single racial group is immediately suspect. The courts must subject them to the most rigid scrutiny.[57]

The courts will look to the purpose of the statute. Whether the legislative enactment is reasonable or not will be determined from the natural effect of such statutes when put into operation. The proclaimed purpose itself is not the deciding factor.[58]

Form or mere pretense should be overruled. The substance of the thing must be the subject of inquiry. If a statute has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to give effect to the Constitution.[59]

In considering the question of whether the denial of commercial fishing licenses to "aliens ineligible to citizenship" is a valid exercise of the discretionary power of the state legislature or not, the background of the agitation for the passage of such provision in the years gone by as well as the conditions of the times cannot be ignored. Certainly, when the classification is extended beyond "aliens" by dividing them into "eligible" and "ineligible" to citizenship, such restrictions which curtail the civil rights of a single racial group are immediately suspect. The courts must subject them to the most rigid scrutiny.[60]

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[57] *Korematsu v. United States*, 323 U. S. 214, 216.

[58] *Lockner v. New York*, 198 U. S. 45; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350; *Coppage v. Kansas*, 236 U. S. 1.

[59] *Mugler v. Kansas*, 123 U. S. 623.

[60] *Korematsu v. United States*, 323 U. S. 214, 216.

California and the few states which have anti-alien land laws, are the only ones which have gone to the extent of classifying aliens who are "eligible" and who are "ineligible" to citizenship, as far as can be ascertained. In all the others the basis has been citizens versus aliens.[61]

The justification urged for the validity of the amendment to Section 990 of the Fish and Game Code has been that it is a "conservation" measure. Whether such was the true motive or not need not be accepted for this court has stated recently:

> "In approaching cases, such as this one, in which the federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in expressed terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."[62]

The history of the amendments made to Section 990 clearly establishes the fact that a rational basis for the classification is lacking. The 1943 amendment provided that "a commercial fishing license may be issued to any person other than alien Japanese." This provision could not have withstood the constitutional test against racial discrimination. Consequently, another amendment was proposed in the 1945 legislative session. And those who proposed such change stated:

> "That there is danger of the present statute being declared unconstitutional, on the grounds of discrimi-

[61]Milton R. Konvitz, "The Alien and the Asiatic in American Law," Cornell University Press (1946), pp. 190-207.

[62]*Oyama v. California*, 68 S. Ct. 269.

nation since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship.

"The committee has introduced Senate Bill 413 to make this change in the statute."[63]

The then existing conditions verify the motive as frankly stated by the sponsors of the amendment.

There was no relation between "conservation" and the prohibition against Japanese in the first instance. The mass evacuation of all persons of Japanese ancestry from the West Coast had been effected by the end of October of 1942;[64] consequently there were no alien Japanese to do any fishing. Such being the case, the logical conclusion that could be drawn was that the hatred engendered by the war hysteria, the race prejudice long prevalent, and the desire to drive the alien Japanese from the fishing industry if and when they were permitted to return to their homes motivated the passage of the amendment.

In 1945, the alien Japanese were still largely living in the relocation centers. The real return to their pre-war residences had not started until a compulsory resettlement program had been imposed upon the evacuees by the War Relocation Authority in 1946.[65]

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[63]Senate Fact-Finding Committee on Japanese Resettlement—Report May 1, 1945, Published by the Senate of California, pp. 5, 6.

[64]Lieutenant General DeWitt: *Final Report, Japanese Evacuation from the West Coast, 1942;* Government Printing Office, 1943, p. 280.

[65]U. S. Department of Interior, War Relocation Authority, *The Evacuated People.*

Since there were no alien Japanese fishermen to interfere with the alleged conservation measure, the only reason which can be attributed is that contained in the report of the Senate Fact-Finding Committee.[66] And what better source for the reasons of the Amendment can be had than from the sponsors of the bill?

If the measure had been prompted by the need for conservation, why was it necessary to impose a prohibition against a group of people who were then not residing within the state of California?

The claim of conservation overlooks the fact that many types and means for conservation had been devised and enforced by the State of California and passed even by the 1945 legislature.[67]

Districts for fishing, seasons, amount to be taken, sizes, grades, distinction between sporting and commercial fishing and so forth—all these provisions are true conservation measures, germane to the purpose.[68]

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[66]Senate Fact-Finding Committee on Japanese Resettlement—Report, May 1, 1945, Published by the Senate of California.

[67]Secs. 806.5, 807.5, Taking of clams; Sec. 811, Regulation pertaining to hard shell cockles; Secs. 842.5, 860, 875.5, 880, 881, 883, 887, etc., Use of nets; Sec. 954, Taking of crabs—Fish and Game Code.

[68]Fish and Game Codes: Secs. 60-118.5, Districts for Fish and Game; Secs. 610-631, Trout; Secs. 691-717, Bass; Sec. 792, Season for Abalone; Sec. 782, Season for Lobsters; Sec. 780, Taking of Shrimps; Secs. 840-959, Use of Nets for Various Fishes; Secs. 972-973, Use of Lines; Secs. 970-971, Use of Traps; Sec. 1110, Operation of Fishing Board; Sec. 1063, Establishment of Grades; Sec. 1066, Sardine Reduction Limit.

Furthermore, according to the census of 1940, there were only 853 aliens besides the Japanese who were still "ineligible to citizenship" residing in the continental United States.[69] The extent conservation can be effected by permitting all the residents of California numbering into the millions commercial fishing license and prohibiting only a few "aliens ineligible to citizenship" creates an immediate suspicion. The so-called conservation measure does not prohibit even non-residents from obtaining licenses. In other words, any person, excepting an "ineligible' is permitted to fish. The mathematics involved make it most obvious that the claim of the state is a sham and excuse, concocted subsequently to uphold and justify a racial discrimination.

The various provisions of the Fish and Game Code provide the measures to protect and conserve all types of fish. Even a casual comparison of the various conservation measures heretofore adopted makes it apparent that there is no rational or even a superficial relationship to the purpose and object for which commercial licenses were denied to a group who were then not living within the state of California and who were then unable to do any fishing even if they were residents because of the state of war with Japan and the regulations imposed by the armed forces.[69a]

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[69] *16th Census of the U. S.*, 1940.

[69a] Thirty-eighth Biennial Report, Bureau of Marine Fisheries of California.

Change in Conditions Make the Classification of Ineligibility to Citizenship Unconstitutional.

World War II has witnessed interesting developments in the attitude and conducts of aliens in relation to their mother country and the land of their adoption, the United States. The fears and doubts pertaining to loyalty and national safety have been found to be without foundation. The concurring opinion of Justice Murphy in the recent decision of *Oyama v. California* discusses this matter in detail.[70]

The case of *Terrace v. Thompson*[71] first upheld the validity of this special classification based on "ineligibility to citizenship" and has become the precedent for subsequent decisions. The knowledge of the facts and the conditions existing were as of 1923. A quarter of a century has elapsed. And many changes have taken place.

The number of aliens racially ineligible to citizenship residing in the continental United States in 1920 was estimated around 134,135—alien Chinese, American Indians and Hindus were included.[72]

Since 1942, great progress has been made in conforming to the American way of life, to judge an individual on his own merits and not to generalize on a group or race

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[70]68 S. Ct. 269.

[71]263 U. S. 197.

[72]McGovney, *Anti-Japanese Land Laws* (1947), 35 California L. Rev., No. 1, p. 11.

basis[73]. There are in the whole of continental United States approximately 48,158 aliens racially ineligible to citizenship today. Of this number, 47,305 are alien Japanese; 749 Koreans and the remainder Polynesians and other Asiatics.[74] When the case of *Terrace v. Thompson* was decided in 1923,[75] there were about 134,135 who were ineligible to citizenship.

The changing naturalization laws point out the unsoundness of "ineligibility to citizenship" to be used in any type of conservation legislation.[76]

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[73]The naturalization law itself has been greatly broadened so that today it reads:

"The right to become a naturalized citizen . . . shall extend only to—

(1) white persons, persons of African nativity or descent, and persons who are descendants of races indigenous to the continents of North and South American or adjacent islands and Filipino persons or persons of Filipino descent;

(2) persons who possess, either singly or in combination, a preponderance of blood of one or more of the classes specified in clause (1);

(3) Chinese persons and persons of Chinese descent, and persons of races indigenous to India; and

(4) persons who possess, either singly or in combination a preponderance of blood of one or more of the classes specified in clause (3) or, either singly or in combination, as much as one-half blood of those classes and some additional blood of one of the classes specified in clause (1)."

8 U. S. C. (1940), Sec. 703, as last amended by Pub. L. No. 483, 79th Congress, 2d. Sess. (July 2, 1946).

[74]*16th Census of the United States:* 1940, Characteristics of the Nonwhite Population, p. 2.

[75]263 U. S. 225.

[76]In the footnote of *Oyama v. California,* 68 S. Ct. 269, Chief Justice had the following:

"At the time the Alien Land Law was adopted the right to be naturalized extended only to free white persons and persons of

This means that as of today, when "aliens ineligible to citizenship" are classified, it could mean only the Japanese in actual effect. This is especially true with the State of California where there is the largest percentage of Japanese of all the states of the Union.

Just as the Constitution is not static, so must the decisions of the Court keep pace with the changing times and conditions. Justice Brandeis stated:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in conditions to which it is applied."[77]

The history of our naturalization laws is a history of race legislation. Therefore, excepting for the claimed plenary powers of Congress, they would have been ruled unconstitutional. When the first law was passed in 1790, it provided that only "free, white persons" shall be eligible to citizenship. Changes were made from time to time.[78]

African nativity or descent. In 1940, descendants of races indigenous to the Western Hemisphere were also made eligible, 54 Sta. 1140; in 1943 Chinese were made eligible, 57 Sta. 601; and in 1946 Filipinos and persons of races indigenous to India were made eligible, 60 Sta. 416, 8 U. S. C. A., Sec. 703 (1946 Supp.) . . . It seems to be accepted that Japanese are among the few groups not eligible to citizenship."

[77] *Nashville C. & St. L. R. Co. v. Waters*, 294 U. S. 405, 415.

[78] American citizenship or eligibility to naturalization has been extended by Congress to include:

1790—Free white persons.
1870—Persons of African nativity or descent.
1900—Inhabitants of Hawaii.
1917—Inhabitants of Puerto Rico.
1924—American Indians.
1927—Inhabitants of the Virgin Islands.
1940—Races indigenous to North or South America
1943—Chinese.
1946—Filipinos and natives of India.

"In Our House But Not Of It"—Committee for Equality in Naturalization, Washington, D. C.

Following the enactment of the 14th Amendment, the basis for eligibility to citizenship has been gradually broadened so as to include all persons of African nativity, natives indigenous to the Western Hemisphere; and during World War II, the barriers were relaxed for Asiatics for the first time.[79]

Can any state adopt a race standard set up by Congress for its own use? Justice Murphy stated in this connection:

". . . Yet it does not follow, even if we assume that Congress was justified in adopting such racial distinctions that California can blindly adopt those distinctions for the purpose of determining who may own and enjoy agricultural land. What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutional for a state legislature for another and wholly distinct purpose. Otherwise there would be few practical limitations to the power of a state to discriminate among those within its jurisdiction, there being a plethora of federal classifications which could be copied.

"In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction was taken from a federal statute or that the distinction may be rationalized for the purpose for which Congress used it. *The state's use of the distinction must stand or fall on its own merits.* And if it appears that the equal protection clause forbids the state from using the distinction

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[79]8 U. S. C. (1940), Sec. 703, as last amended by Pub. L. No. 483, 79th Congress, 2d Sess. (July 2, 1946).

for the desired purpose, the fact that Congress is free to adopt distinction in some other connection gives the state no additional power to act upon it. Thus the state acquires no power whatever to impose racial discriminations upon resident aliens from the Congressional power to exclude some or all aliens on a racial basis." (Italics ours.)[80]

The various government agencies have helped to prove that loyalty is not a matter of race. The United States Army demolished all fears about the dangers of an alien as compared to a citizen by utilizing the manpower of the alien enemy Japanese at the munition dumps of Utah and Nebraska while the war with Japan was at its height. The maps that the air force and other branches of the armed forces used, in their invasion of Japan were prepared by the Army Map Service with headquarters in Cleveland, Ohio, with alien Japanese as valuable staff members because of their familiarity with the geography and topography of Japan. The Army and Navy intelligence schools availed themselves of the special knowledge of the Japanese language by the alien Japanese. The Office of War Information and the Office of Strategic Services and numerous other top priority agencies could not have functioned efficiently and effectively without the aid of the alien Japanese. The food production and defense plants were materially aided through the labors of these aliens.[80a]

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[80]Concurring Opinion in *Oyama v. California*, 68 S. Ct. 269.

[80a]"They Work For Victory," published by the Japanese American Citizens League, 1945.

Limitation of Occupational Opportunities Based on Eligibility to Citizenship Violates the Equal Protection of the Laws and Due Process Clauses of the Fourteenth Amendment.

The basic concept of the equal protection and due process clauses of the Fourteenth Amendment is that the Amendment "was designed to bar the States from denying to some group, on account of their race or color, any rights, privileges, and opportunities accorded to other groups."[81] The protection applies to all persons within the territorial jurisdiction, without regard to differences of race, creed, color or nationality."[82]

> "The equality guaranteed is equality under the same conditions, and among persons similarly situated. However, the Legislature may make a reasonable classification of persons and businesses and pass special legislation applying to certain classes. The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished."[83]

The petitioner herein is an alien Japanese who is a resident of the State of California. As such, he is "entitled to the same protection under the laws" that a citizen is entitled to. He owes obedience to the laws of the country

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[81]Concurring opinion of Justice Murphy, *Oyama v. California*, 68 S. Ct. 269.

[82]*Truax v. Raich*, 239 U. S. 33; *Yick Wo v. Hopkins*, 118 U. S. 356.

[83]*Takahashi v. California*, 30 Calif. Advance Reports 723,731, and cases cited.

to which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.[84]

The question is as to the extent the state legislature can go in the exercise of its powers to deny a person from earning a livelihood. There are constitutional limitations against racial discrimination which must be overcome.

Despite the powers the state legislature may have over its own wild game and fish within its jurisdiction, the status necessarily changes when permission is given to operate an industry. In this instance, the State of California has made a distinction between sporting and commercial fishing.[85]

Those who are engaged in fishing for profit are required to obtain commercial fishing licenses; and those whose fishing is not for profit are required to obtain sporting licenses. In other words, the state no longer can claim the usual power it has over its own fish. If it has permitted an industry to be developed, then the restrictions it places upon the occupation and labor involved will come under the rulings of *Truax v. Raich*.[86]

> "It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . If this could be refused solely upon the ground of race of nationality, the prohibition of the denial to any person of the

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[84]*Wong Wing v. United States*, 163 U. S. 228, 242.

[85]Fish and Game Code, Sections 420 and 990.

[86]*Truax v. Raich*, 239 U. S. 33.

equal protection of the laws would be a barren form of words. . . .[87]

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission would be segregated in such of the States as chose to offer hospitality, . . ."[88]

9344 persons had obtained licenses for commercial fishing during the year 1941-42. Out of this number 699 were alien Japanese. In 1943-44, the number was 11,747.[89]

The number who earn their livelihood from this industry unquestionably makes it one of the common occupations of the communities of the four ports where fishing was centralized. Therefore, to deny anyone on the flimsy grounds of "ineligibility to citizenship" is a denial of the equal protection and due process of the laws.

In order to justify the position of the state, the majority opinion of the California Supreme Court stated as follows:

"Obviously, if the Legislature determines that some reduction in the number of persons eligible to hunt

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[87] *Ibid.* p. 41.

[88] *Ibid.* p. 42.

[89] California Fish Bulletin No. 59, pp. 24-25; Thirty Eighth Biennial Report, p. 35; Thirty-Ninth Biennial Report, p. 103.

> and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so. This is a logical, established, and reasonable method of classifying for conservation purposes, and the existence of facts supporting the legislative judgment is presumed. . . ."[90]

The fact that the alien land law decisions approved the classification of "ineligible to citizenship" is not binding in every instance. There must be a substantial relation to the legitimate object to be accomplished. And such classification has not been the established method as far as California has been concerned for conservation purposes.[90a]

Furthermore, a common occupation is involved in this case. Would the court have approved a provision which would have stated that "aliens ineligible to citizenship" cannot work on farm lands because the ownership is prohibited? California dares not go to this extent.

> "We are told, however, that, despite the sweeping prohibition against Japanese ownership or occupancy, it is no violation of the law for a Japanese to work on land as a hired hand for American citizens or for foreign nationals permitted to own California lands. And a Japanese man or woman may also use or occupy land if acting only in the capacity of a servant. . . ."[91]

Various types of professions are restricted to citizens. But does that necessarily follow that everyone assisting must be a citizen? Can the state legislature dictate to the

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[90] *Takahashi v. California*, 30 Calif. Advance Reports 723.

[90a] See footnote 68.[4]

[91] *Oyama v. California*, 68 S. Ct. 269.

effect that the law clerks and stenographers must be citizens simply because it requires citizenship to become a member of the bar?[91a] The answer is obvious. Any law that restricts the earning of a livelihood to this extent is unconstitutional.

As to whether California laws of this nature are intended to single out the alien Japanese needs little argument. Justice Black stated in the recent decision, *Oyama v. California:*

> "The California law in actual effect singles out aliens of Japanese ancestry, ... This is true although the statute does not name the Japanese as such, and although its terms also apply to a comparatively small number of aliens from other countries. That the effect and purpose of the law is to discriminate against Japanese because they are Japanese is too plain to call for more than a statement of that well-known fact."[92]

Justice Murphy stated in the same case:

> "It is true that the Alien Land Law, in its original and amended form, fails to mention Japanese aliens by name. Some of the proposals preceding the adoption of the original measures in 1913 had in fact made specific reference to Japanese aliens. But the expansion of the discrimination to include all aliens ineligible for citizenship did not indicate any retreat from the avowed anti-Japanese purpose."

Chief Justice Vinson stated in *Oyama v. California,* that "it seems to be accepted that Japanese are among the few groups not eligible for citizenship."[93]

[91a]California Business and Professions Code, Sec. 6060.

[92]*Oyama v. California,* 68 S. Ct. 269, concurring opinion of Justice Black.

[93]*Ibid.,* footnote on p. 269.

The trial court in this case found:

> "As it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California, and as the Court must take judicial notice of the same fact, it becomes manifest that in enacting the present version of Section 990, the Legislature intended thereby to eliminate Japanese from those entitled to a commercial fishing license by means of description rather than by name. *To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent.*" (Italics ours.)

The trial court further stated:

> ". . . this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground or classification, and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United Staes, wherein and whereby a state is forbiddent to deny to any person within its jurisdiction the equal protection of the laws. . . ."[94]

The minority opinion of the California Supreme Court in this case stated:

> "Finally, highly persuasive arguments may be made that the law in the instant case is aimed solely at Japanese in an obvious discrimination against a

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[94]R. 17-18.

particular race, in spite of the fact that that race is not mentioned by name in the statute, by reason of the historical background of alien legislation and court decisions. . . ."[95]

As far as California laws are concerned, it is generally accepted that "ineligible to citizenship" was intended to single out the alien Japanese. The legislative history of the fishing bills in the state legislature makes this obvious.

Furthermore, the entire record of the 1943 and 1945 legislative sessions of the State of California establish beyond a shadow of a doubt that hatred against persons of Japanese ancestry had permeated the atmosphere to such an extent that the wonder is the legislators restrained themselves to what they did.[95a] The sessions of 1947 and

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[95] *Takahashi v. California*, 30 Calif. Advance Reports 723.

[95a] The California legislative session of 1943 showed its true colors through the resolutions and laws passed:

1. Affidavit of "aliens ineligible to citizenship" not acceptable in applications for registering of previously unregistered births. Thus even parents were precluded from aiding their children to establish their birth.
   Stats. 1943, Chap. 13, pp. 121-22;
   Sections 10615-16, Health and Safety Code.
2. Senate Joint Resolution No. 21 memorialized "Congress to release implements and commodities stored for Japanese evacuees to the civilian population for use during this time of war . . . ."
   Stats. 1943, Chap. 114, pp. 3341-42.
3. Senate Joint Resolution No. 3 memorialized Congress to forfeit citizenship of those holding dual citizenship.
   Stats. 1943, Chap. 113, pp. 3340-41.
4. Amendment to the hunting license:
   ". . . that no such license shall be issued to an alien Japanese."
   Section 427, Fish and Game Code;
   Stats. 1943, Chap. 1100, pp. 3039-40.
5. Amendment to the sporting fishing license.
   ". . . that no such license shall be issued to an alien Japanese."
   Section 428, Fish and Game Code;
   Stats. 1943, Chap. 1100, p. 3040.

1948 shows a marked contrast and a change for the better in that the appropriation bill of $65,000 for the escheat

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6. Amendment to commercial fishing license:
"that no such license shall be issued to an alien Japanese."
Section 990, Fish and Game Code;
Stats. 1943, Chap. 1100, p. 3040,

7. Several amendments to the Alien Land Law were enacted:
a. Appointment of alien as guardian
Stats. 1943, Chap. 1059, Secs. 1 and 2.
b. Sale or operation of escheated reality.
Stats. 1943, Chap. 1003, Sec. 1.
c. Escheat of leasehold or other interest in reality: Stock or interest in company.
Stats. 1943, Chap. 1059, Sec. 3.
d. Punishment for violations.
Stats. 1943, Chap. 1059, Sec. 4.
e. Injunction proceedings.
Stats. 1943, Chap. 1059, Sec. 4 (5).
f. Declaratory proceedings.
Stats. 1943, Chap. 1059, Sec. 6.
g. Leases, etc., in name of wife, child or other person.
Stats. 1943, Chap. 1059, Sec. 7.
h. Evidence.
Stats. 1943, Chap. 1059, Sec. 8.

Since the war was still on against Japan, the 1945 legislative session continued to enact anti-Japanese laws and pass unfavorable resolutions:

1. Senate Joint Resolution No. 9:
To memorialize Congress to deport the Japanese nationals and certain persons of Japanese descent.
Stats. 1945, Chap. 36, p. 101.

2. Senate Joint Resolution No. 5:
Substitution of United States Army for War Relocation authority in the Administration of Tule Lake Japanese Center and other internment camps.
Stats. 1945, Chap. 19, p. 83.

3. Appropriation of $200,000 for investigation and prosecution of escheat cases.
Stats. 1945, Chap. 1458, p. 2739.

4. Amendment to Section 427 of the Fish and Game Code, Class A hunting license:
"no such license shall be issued to a person ineligible to citizenship."
Stats. 1945, Chap. 1100, Sec. 1, p. 3039.

5. Amendment to Section 427 of the Fish and Game Code, Class B sporting fishing license:

proceedings was the only unfavorable measure passed in 1947 and there was nothing in the 1948 session.

"no such license shall be issued to a person ineligible to citizenship."

6. Amendment to Section 990 of the Fish and Game Code, commercial fishing license:

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. . . ."

Stats. 1945, Chap. 191, Sec. 3.

7. Assembly Joint Resolution No. 13 relative to exchange of United States and Japanese nationals, heartily commending the U. S. State Department and urging it to continue the efforts so that every American held by the Japanese Government be returned to the United States . . ."

Stats. 1945, Chap. 25, p. 2948.

8. Senate Constitutional Amendment No. 17, to incorporate the initiative Alien Land Law and subsequent amendments as part of Section 17, Article 1, of the State Constitution.

Stats. 1945, Chap. 139, p. 3147.

9. Amendments to the Alien Land Law:

a. Escheat of property acquired in fee.
Stats. 1945, Chap. 1129, Sec. 1.

b. Sale or operation of escheated realty.
Stats. 1945, Chap. 1129, Sec. 2.

c. Escheat of leasehold or other interest in realty.
Stats. 1945, Chap. 1129, Sec. 3.

d. No statute of limitations.
Stats. 1945, Chap. 1136, Sec. 1.

e. Conveyance to prevent escheat.
Stats. 1945, Chap. 1129, Sec. 4.

The 1947 Legislature had Senate Bills 666, appropriating $65,000 for the Attorney General to enforce the Alien Land Law, and 1453, to appropriate $200,000 for the same purpose.

Bill 1453 was not acted upon. However, the $65,000 was passed by the bare hard-fought vote margin of five (5) in the Assembly.

It passed amendments to Sections 427 and 428 of the Fish and Game Code, permitting "aliens ineligible to citizenship" to obtain sport fishing and hunting licenses on equal basis with all aliens.

The 1948 budget session of the Legislature did not pass any bill pertaining to persons of Japanese ancestry. (Pacific Citizen, April 3, 1948.)

The foregoing account of laws enacted by the two wartime legislative sessions of California supplements the already abundant evidence that "ineligible to citizenship" was singling out the alien Japanese in fact.

The reports of the legislative committees throw additional interesting lights. The Joint Fact-Finding Committee Investigating Un-American Activities in California filed its findings of two years investigations throughout the state on June 13, 1945. It stated:

> "In conclusion on the Japanese problem, your committee, in view of the foregoing representative opinions and recitations of official facts, reaffirm its position that: It is dangerous to the public safety, and to the safety of the Japanese aliens, and those of American birth, to return them to this vital defense area during the war with Japan."[95b]

A similar report was filed with the Senate.

The Senate Fact-Finding Committee on Japanese Resettlement had the following conclusion:

> "This committee is vigorously opposed to the return of any Japanese to California until after the end of the war with Japan."[95c]

In 1880, when the anti-Chinese feeling was at its height, the California legislature passed an act which provided:

> "All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell. . . . ."[96]

[95b] Assembly Journal, Vol. 2, 56th Session, pp. 4126-46.

[95c] Senate Journal, Vol. 2, 56th Session, p. 2323.

[96] *In re Ah Chong*, 2 Fed. 733, 734.

Although the wording is different, the effect is the same as the present Section 990 of the Fish and Game Code. And there, the federal circuit court held:

> "It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, *considered in connection with the public history of the times,* that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. . . ." (Italics ours.)
>
> "The act is clearly unconstitutional. . . ."[97]

What the state cannot do directly, it should not be permitted to do indirectly. All anti-Japanese legislations of California have been intended to deprive the opportunities to earn a livelihood for those alien Japanese already residing within the state and to discourage others from coming within the state.

A clear enunciation by this Court as to the rights of alien Japanese who are residents of California under the Fourteenth Amendment will be timely.

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[97] *Ibid.*, 737.

Conclusion.

A halt must be called to the broadening of the classification permitted in discriminating persons residing within this country. A wedge made here and there has curtailed the opportunities of the aliens to earn a livelihood. More and more, the significance of the protection of the Fourteenth Amendment is being minimized.

Under one pretense or another, opportunities to work and earn a livelihood are being denied. The extremes may be noted when citizenship is made a requisite for becoming a chauffeur, manicurist, masseur, watchman, embalmer, barber, private detective, plumber, and numerous other vocations.[98]

To bar aliens who are residents of the state is already carrying the classification to the brink of a violation of constitutional rights. A distinction based on "ineligibility to citizenship" certainly should not be tolerated. There is no other conclusion than that it is race discrimination.

The classification in the federal naturalization laws is based on race. Therefore, it is not a reasonable or rational standard for the states to adopt in other matters, especially in matters pertaining to earning a livelihood.

Accordingly Section 990 of the California Fish and Game Code denies to the petitioner his rights afforded by

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[98]Konvitz, "The Alien and the Asiatic in American Law," pp. 210-11.

the equal protection and due process clauses of the Fourteenth Amendment.

The judgment should be reversed.

Respectfully submitted,

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